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CLERK

81-27

IN THE

Supreme Court of the United States

May Term 1981

NO. _____

ELLEN LUCE, Petitioner

v.

LEONARD GOVAN, Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
First Supreme Judicial District Court
of Texas, Sitting at Houston

DON E. KILPATRICK
One Houston Center,
Suite 703
Houston, Texas 77010

Attorney for Petitioner

QUESTIONS PRESENTED

I. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights of due process of law under the Fourteenth Amendment of the Constitution of the United States by holding of the Court of Civil Appeals that the trial court properly dismissed Petitioner's cause of action for non-payment of a small portion of the court costs due to the fact that Petitioner, having paid some court costs, was not given fair notice that there were additional costs due, and was not given notice of hearing where trial court dismissed her case.

II. To accord Petitioner her right to trial by jury, did the lower courts exceed their authority and abuse their discretion in requiring payment of court costs as a condition to the continuance of case upon the trial docket, deny Petitioner of her federally and constitutionally insured rights to trial by jury under the Constitution of the United States.

LIST OF ALL PARTIES

Ellen Luce, Petitioner

Leonard Govan, Respondent

Don E. Kilpatrick, Attorney for Petitioner

David E. Lueders, Attorney for Respondent

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IN THE

Supreme Court of the United States

May Term 1981

NO. _____

ELLEN LUCE, Petitioner

v.

LEONARD GOVAN, Respondent

ON PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
First Supreme Judicial District Court
of Texas, Sitting at Houston

TO: The Honorable, The Chief Justice
And The Associate Justices of The
Supreme Court Of The United States

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, in the above cause. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the First Judicial District at Houston was handed down September 25, 1980. There is no opinion reported as per TEX. R. CIV. P. 452 by the Supreme Court of Texas but it refused, no reversible error, Petitioner's Application for Writ of Error upon January 28, 1981, and overruled Petitioner's Motion for Rehearing on March 4, 1981. The unreported opinion is found at Appendix "A". The judgment affirming the judgment of the Trial Court, and the judgment of the Trial Court, which dismissed Petitioner's cause of action are found at Appendixes "B" and "F" respectively.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Honorable Court is based upon the Acts of Congress of June 25, 1968, c. 646, 62 Stat. 929, Title 28, U.S. Code, § 1257(3), providing that this Court may, by Writ of Certiorari, review any final judgment of decree rendered by the highest Court of

the State in which a decision could be had, where any title, right or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The opinion and judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, sought to be reviewed herein, was rendered on September 25, 1980, set out in Apendixes "A" and "B", represents the highest State Court when the Texas Supreme Court refused, no reversible error, to entertain jurisdiction on January 28, 1981 and overruled Petitioner's Moiton for Rehearing on March 4, 1981, set out in Apendixes "D" and "E", respectively.

Petitioner invokes the jurisdiction of this Court under Supreme Court Rule 19(1)(a). The State Court has determined several questions of substance in this case not heretofore determined by this Court, and has declared them in a way that is not in accord with applicable

decisions of this Court.

The holding of the Court of Civil Appeals affirming the judgment of the Trial Court in dismissing Petitioner's cause of action for non-payment of court costs of which Petitioner had no notice had the effect of depriving Petitioner of her constitutional rights of due process of law under the Fourteenth Amendment.

The Court of Civil Appeals erred in affirming the Trial Court's judgment dismissing Petitioner's cause of action because the requirement of payment of costs, valid on its face, is against due process because it operates to foreclose Petitioner's opportunity to "have her day in court".

The jurisdiction of this Court is sought to remedy an unjust verdict that has the effect of depriving Petitioner of her chance to be heard.

STATEMENT

This is a personal injury lawsuit from Harris County, Texas. The Trial Court granted two mistrials because the

Plaintiff's attorney allegedly injected insurance into each trial. After the second mistrial the Court, on its own motion, order the Plaintiff to pay costs. The Plaintiff paid Seven Hundred Two Dollars and Ten Cents ($702.10) of the costs, same being reflected as due and owing at the time Plaintiff paid them. However, when a cost bill dated January 8, 1980 was issued, it showed an amount of Seven Hundred Seventy-Seven Dollars and Sixty Cents ($777.60) as costs with Seventy-Five Dollars and Fifty Cents ($77.50) still unpaid. The Trial Court on January 8, 1980, without notice to Plaintiff, dismissed Plaintiff's cause from the docket.

HOW THE FEDERAL QUESTION WAS RAISED

Petitioner brought suit against Leonard Govan to recover damages for injuries she received when the truck Mr. Govan was driving crashed into the rear of her automobile as she was stopped at a traffic light.

Petitioner was ordered by the trial court to pay court costs. She was pre-

sented a cost bill by the District Clerk's office in the amount of Seven Hundred Two Dollars and Ten Cents ($702.10) which she subsequently paid believing this to be the total amount of costs due.

On January 8, 1980, the trial court dismissed Petitioner's cause of action because she had not paid the balance of the costs of Seventy-Five Dollars and Fifty Cents ($75.50) which Petitioner was unaware was due as she or her attorney had not been presented an additional cost bill. As soon as Petitioner became aware of additional amount she paid as evidenced by Appendix "G".

The fact that Petitioner or her attorney was not given notice of the January 8, 1980 hearing at which her cause of action was dismissed violates her rights of due process of law under the Fourteenth Amendment of the Constitution of the United States, which states that no State shall deprive any person of life, liberty, or property, without due process of law, and Petitioner contends that her right to damages for her injur-

ies is a property right.

ARGUMENT

Petitioner was deprived of her rights under the Fourteenth Amendment of the Constitution of the United States when the trial court on January 8, 1980 signed and entered the Order dismissing Petitioner's case as no notice of the hearing was provided Petitioner or her attorney.

Petitioner was not accorded her rights to be heard by a jury of her peers as her case was dismissed by the trial court without notice of the January 8, 1980 hearing to her or her attorney. In Fuentes v. Shevin, (1972) 407 US 67, 32 L.Ed. 556, 02 S Ct 1983, this Honorable Court said, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." This is the question presented to the Honorable Court. It is respectfully submitted that the lack of notification of the hearing of January 8, 1980, deprived Petitioner of her federally creat-

ed rights of due process of law under the Fourteenth Amendment of the Constitution of the United States.

It is undisputed that the Respondent or the trial court did not provide notice to Petitioner or her attorney of the January 8, 1980 hearing, in which the Order of Dimissal, Appendix "F", was entered, dismissing Petitioner's case as void, and Petitioner is entitled to a hearing on the entry of said order. The Honorable Trial Court erred in granting an Order for Dismissal for refusing to afford Petitioner a full hearing before entry of said order. Had they had done so, the trial court would have seen that costs had been paid by Petitioner as evidenced by the fact that Petitioner paid the total sum of Seven Hundred Two Dollars and Ten Cents ($702.10), which Petitioner thought was the total sum. The last Seventy-Five Dollars and Fifty Cents ($75.50) being paid on January 23, 1980, as promptly as possible after that amount was outstanding was communicated to Petitioner. Petitioner respectfully requests said Honorable Supreme Court to

reverse and remand the judgment of the Trial Court as same being void and in violation of Petitioner's constitutionally insured rights, and upon remand of the case back to the trial court, if it is found as contended by Petitioner that all costs have been fully and finally paid, that Petitioner's cause be reinstated on the trial docket and that Petitioner be afforded notice and hearing on the entry of the order dismissing her case.

It is undisputed that Petitioner as Plaintiff below did nothing in which to incur the court's sanctions, that if anything was done, it was by Petitioner's attorney. And, while usually the client is bound by the acts of their attorney it is a harsh remedy to inflict dismissal upon an unsuspecting Petitioner. Petitioner would respectfully request said Honorable Supreme Court to reverse and remand Petitioner's cause back to the trial court in order that Petitioner be afforded due process of law on the matter of the alleged wrong occasioned her, that she be afforded her right to trial

by a jury and that if there were any sanctions or wrong doings on the part of her attorney, that said hearing be conducted to impose said sanctions against said attorney and not as against Petitioner as as to deny her a sacred and hallowed right to a trial by jury.

Respectfully submitted,

DON E. KILPATRICK
One Houston Center,
Suite 703
Houston, Texas 77010

By Don E. Kilpatrick
Member of the Bar of
the Supreme Court of
the United States.

CERTIFICATE OF SERVICE

THE STATE OF TEXAS §
COUNTY OF HARRIS §

I, Don E. Kilpatrick, attorney of record for the Petitioner, Ellen Luce, and a member of the Bar of the Supreme Court of the United States, depose and say that on the 1st day of June, 1981, I served triplicate copies of the foregoing Petitioner for Writ of Certiorari in the Supreme Court of the United States on David E. Lueders, 8705 Katy Freeway, Suite 208, Houston, Texas 77024, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid, via Certified Mail.

Don E. Kilpatrick
DON E. KILPATRICK

SUBSCRIBED AND SWORN TO before the undersigned authority this 1st day of June, 1981, to certify which witness my hand and seal of office.

Cherie Chalk

CHERIE CHALK
Notary Public, State
of Texas
My Commission Expires
July 29, 1984

APPENDIX "A"

Affirmed and opinion filed September 25, 1980.

ELLEN LUCE, APPELLANT

NO. 17737 vs.

LEONARD GOVAN, APPELLEE

On Appeal from the 129th District Court of Harris County at Houston, Texas

---

The plaintiff appeals from an order dismissing her suit.

No statement of facts has been brought before this court.

The order of dismissal, signed by the trial court on January 8, 1980, recites that under the terms of a prior order, signed and entered by the court on December 17, 1979, the

plaintiff was required to pay all costs of court within 20 days or have her case dismissed. The January 8, 1980 order further recites that such costs had not been paid as ordered.

The trial court's prior order of December 17, 1979, recites that during the trial the case before a jury on November 8, 1979, the plaintiff gave testimony indicating the defendant had insurance coverage, requiring the court to grant a mistrial. The order further recites that after a second jury had been impaneled and sworn, the plaintiff's counsel, in violation of the trial court's instructions, again injected insurance coverage into the case, causing a second mistrial. The order decreed

that the case would be dismissed unless the plaintiff paid all accrued court costs within 20 days from the date of entry of the order.

Rule 143, Texas Rules of Civil Procedure provides:

> "A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. If such rule be entered against any party and he failed to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed."

It is the plaintiff's contention that she made an attempt to pay the court costs accrued in the case and that on the basis of advice received from the

district clerk's office, she paid the sum of $702.10 and was unaware that an additional sum of $75.50 was due. She states that she did not know such additional amount was due until she received the district clerk's cost bill prepared on January 8, 1980. She contends that if she had received notice of the entry of the order of dismissal she would readily have paid the additional amount of costs.

The record demonstrates that the plaintiff was fully cognizant of the trial court's order entered December 17, 1979, requiring full payment of court costs as a condition to the continuance of the case on the court's docket. The trial court was not required to give the plaintiff further notice prior to dismissing the case

on its own motion after determining that the full amount of accrued court costs had not been paid.

The order of dismissal is a final judgment in the case effectively disposing of the pending action. Dilmore v. Russell, 519 S.W.2d 278, 280 (Tex. Civ.App. - Dallas 1975, no writ). The plaintiff does not contend that the trial court exceeded its authority in requiring payment of the court costs as a condition to the continuance of the case on the court's docket, and the propriety of the trial court's ruling is, therefore, not before this court for review.

A docket sheet entry contained in the transcript indicates that a motion for a new trial filed by the plaintiff was first overruled and then

granted as "per order." However, the record does not contain a written order signed by the trial judge, and after the expiration of 30 days following the date the motion for new trial was overruled by operation of law, the trial court lost jurisdiction over the case. Rule 329 b, T.R.C.P; Reese v. Piperi, 534 S.W.2d 329, 330 (Tex. 1976); See also, Walker v. Harrison, 597 S.W.2d 913 (Tex. 1980).

The trial court's judgment is affirmed.

/s/ Frank G. Evans

ASSOCIATE JUSTICE

Associate Justices Peden and Warren also participating.

No publication, Rule 452, T.R.C.P.

Judgment rendered and opinion filed September 25, 1980.

APPENDIX "B"

COPY OF JUDGMENT

ELLEN LUCE

NO. 17737 VS.

Appeal from District Court of Harris County. (Tr. Ct. #1,069,609) Opinion delivered by Associate Justice Evans, Justices Peden and Warren sitting

LEONARD GOVAN

This cause, being an appeal from an order of dismissal signed by the court below on January 8, 1980, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the

judgment of the court below be in all things affirmed; that the appellant, Ellen Luce, and her surety, Fidelity and Deposit Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Peden, Evans and Warren.

APPENDIX "C"

A F. SEELEMAN
CHIEF JUSTICE

PHIL PEDEN
FRANK G. EVANS
HENRY E. DOYLE
JAMES P. WALLACE
JAMES F. WARREN
ASSOCIATE JUSTICES

Court of Civil Appeals
First Supreme Judicial District
HARRIS COUNTY CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002

MARIBELLE REICH
CLERK

PHONE 221-6

October 30, 1980

COPY

Hon. Don E. Kilpatrick
One Houston Center, Suite 703
Houston, Texas 77002

Hon. David P. Lunders
8707 Katy Frwy., Suite 208
Houston, Texas 77024

Dear Sirs:

Re: 17737, Ellen Luce v. Leonard Goven, from Harris
(Tr.Ct.#1,069,609)

Please be advised the Court today, OVERRULED appellant's motion for rehearing in the above cause.

Respectfully,

MARIBELLE REICH, Clerk

Kathryn Cox Chief Deputy

cs

APPENDIX "D"

IN THE SUPREME COURT OF TEXAS

. . . . . .

January 28, 1981

No. B-9964

ELLEN LUCE
vs.
LEONARD GOVAN

From HARRIS County,
FIRST District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Ellen Luce, and her surety, Fidelity and Deposit Company,

pay all costs incurred on this application.

. . . . . .

March 4, 1981

No. B-9964

ELLEN LUCE
vs.
LEONARD GOVAN

From HARRIS County,
FIRST District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

. . . . . .

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 8th day of May, 1981.

GARSON R. JACKSON, Clerk

By Mary M. Wakefield, Deputy.
Mary M. Wakefield

APPENDIX "E"

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, Mar. 4, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of

B-9964, ELLEN LUCE vs. LEONARD GOVAN

was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX "P"

NO: 1,069,609

ELLEN LUCE	I	IN THE DISTRICT COURT OF
VS.	I	HARRIS COUNTY, T E X A S
LEONARD GOVAN	I	129 133RD JUDICIAL DISTRICE

O R D E R

BE IT REMEMBERED, that on the 17th day of December, 1979, the Court signed and entered its Order wherein the Plaintiff was required to pay all Costs of Court within twenty days or the case would be dismissed, and it appearing that the Costs have not been paid, it is accordingly;

ORDERED, ADJUDGED and DECREED that this cause of action is dismissed and judgment is hereby entered that Plaintiff Ellen Luce take nothing of Defendant Leonard Govan.

SIGNED and ENTERED this 8th day of January, 1980.

Thomas J. Stovall

JUDGE PRESIDING

David E. Lueders
DAVID E. LUEDERS
ATTORNEY FOR DEFENDANT
8705 Katy Freeway, Suite 208
Houston, Texas 77024
(713) 464-3383
TBA# 12672000

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APPENDIX "G"

COUNTY AUDITOR'S FORM 1133-A
HARRIS COUNTY, TEXAS 3-79

STATE OF TEXAS
COUNTY OF HARRIS

RAY HARDY, DISTRICT CLERK
FEE OFFICER'S OFFICIAL RECEIPT

No. 05996

TYPE ACTION: Court Cos.. COURT: ___ CASE NO. 1069609

RECEIVED OF: Donald E. Kilpatrick One Houston Center #703 77002 DATE: 1/23/80

Seventy-five Dollars and 50/100---------- DOLLARS CHECK CASH $ 75.50

STYLE: Ellen Luce VS Leonard Cavan

THIS IS A RECEIPT ONLY IF VALIDATED IN THIS SPACE BY DISTRICT CLERK'S REGISTER

LEGEND

CLERK'S FEES		OTHER FEES	
100	FILING - NEW CASE	200	LAW LIBRARY
101	FILING - CROSS ACTION	250	CHILD SUPPORT
102	FILING - INTERVENTION	300	SHERIFF'S JURY
103	FILING - THIRD PARTY	325	SHERIFF
104	FILING - CONTEMPT	350	CONSTABLE
105	FILING - MOT. NEW TRIAL	400	DEPOSIT (FOR SERVICE)
106	106 SERVICE	425	DEPOSIT (LIEU OF BOND)
107	CITATION	450	DEPOSIT (FOR COSTS)
107a	CIT. (SEC. STATE)	500	JURY
108	PRECEPT	525	STENO
109	WRIT	550	COUNTY ATTORNEY
110	C.C. JUDGMENT	575	DISTRICT ATTORNEY
111	CERT. SDPW	600	TREASURER
112	CERT. SBVS	625	OTHER
113	ABSTRACT	650	URESA
114	EXECUTION	700	REFUNDS
115	SUBPOENA	750	TRUST FUND (TENDERS)
116	BOND APPROVAL	775	TRUST FUND (AWARDS)
117	C/C INV. ORDERS	800	URESA - NO FEE COLLECTED
118	OTHER	825	OTHER - NO FEE COLLECTED
119	TRANSCRIPT	850	PAUPERS OATH
120	MED. LICENSE		

REFUNDS

$ 72.50	Wohlt, Lueders & Hope

RAY HARDY, DISTRICT CLERK

BY: M Griffith DEPUTY

CUSTOMER'S COPY

PLEASE SHOW STYLE AND CASE NUMBER ON YOUR REMITTANCE
PLEASE ATTACH REMITTANCE TO THIS STATEMENT AND RETURN

Houston, Texas 1-8 1980

M Don Ea. Kilpatrick

To RAY HARDY, District Clerk

400 Civil Courts Building — Houston, Texas 77002

No. 1069609 Ellen Luce vs. Leonard Moran

	PAID BY	AMOUNT
[illegible]	due	3 —
[illegible]'s Cost	Plff	19 —
[illegible]riff's/Constable's Cost		9 —
[illegible] Library		2 50
[illegible]-for 11-10-78 Clerk		4 —
Processed		8 —
7-5-79 Clerk		4 —
Processed		10 —
7-5-79 Clerk		4 —
Processed		10 —
10-26-79 Clerk		8 —
Processed		20 —
Depo		109 20
S		175 —
		150 —
		109 40
Jury	def't	5 —
Dep't	✓	167 50

COURT 129
JUDGMENT SIGNED 1-8-80
BY JUDGE Stovall
RAY HARDY, DISTRICT CLERK [signature] DEPUTY

TOTAL COSTS	777 60
Paid by Plaintiff	702 10
Paid by Defendant	
Paid By	
Total Costs Due and Unpaid by Plff	75 50